75-6847

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

75-6847

ROZELLE (ROSA L.) OXENDINE HUNT,

Petitioner,

v

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Dated: July 2, 1976

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 NC 403, 222 SE 2d 234(1976) and is attached to Petitioner's petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3) to review the judgment referenced above which was filed March 2, 1976.

QUESTIONS PRESENTED

I. WHETHER THE QUESTIONING OF THE PROSPECTIVE JURORS AS TO THEIR ATTITUDES TOWARDS THE IMPOSITION OF THE DEATH PENALTY VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE STATE'S EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT JOE HUNT'S DEATH WAS CUASED BY POISON, OR THAT THE AUTOPSY WAS PERFORMED ON THE BODY OF JOE HUNT.

III. DOES THE RULE THAT FAILURE TO OBJECT TO CERTAIN EVIDENCE PRECLUDES AN APPELLATE REVIEW OF ITS ADMISSIBILITY, VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION

Amendment VI

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was tried upon a bill of indictment charging her with the murder of Joseph Hunt. She was tried by a Judge and a jury in the Anson County Superior Court at Wadesboro, North Carolina during the June 10, 1974 session of the Court. The jury found the defendant guilty of murder in the first degree and the Superior Court entered its judgment condemning the defendant to death. The judgment of the lower court was affirmed by the Supreme Court of North Carolina on appeal. In that appeal: Assignment of Error No. 1 raised the issue set out in Question I of this Brief; Assignment of Error No. 10 raised the issue set out in Question II of this Brief, and; Assignment of Error No. 5 raised the issue set out in Question III of this Brief.

The respondent, State of North Carolina, agrees with those facts pertinent to this petitioner's rights as set forth in the opinion of the North Carolina Supreme Court which is attached to the petitioner's Petition for Writ of Certiorari and heretofore filed in this Court.

REASONS FOR NOT GRANTING THE WRIT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE QUESTIONING OF THE PHOSPECTIVE JURORS AS TO THEIR ATTITUDES TOWARDS THE IMPOSITION OF THE DEATH PENALTY VIOLATED THE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE ISSUE HAS BEEN DECIDED BY PRIOR DECISIONS AND SUCH QUESTIONING WAS PROPER.

The issue of the propriety of questioning prospective jurors in regard to their attitude towards the death penalty has been addressed by prior decisions of this Court and therefore the petition should be denied in accordance with this Court's Rule 19.

Petitioner complains that it was a violation of her rights to allow the State to question prospective jurors concerning their attitude towards the death penalty. (The State did not challenge any juror for cause and used only its peremptory challenges.) In Witherspoon v Illinois, 391 U.S. 510, 83 S.Ct. 1770, 20 L.Ed. 2d 776(1968) this Court stated:

> ". . .nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra., footnote 21 at p. 522.

In North Carolina a jury does not have the discretionary function of recommending life imprisonment and therefore a verdict of guilty results in the automatic imposition of the death penalty. State v Waddell, 282 N.C. 431, 194 S.E. 2d 19(1973), which applied this Court's ruling in Furman v Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346(1972). A juror who was opposed to the death penalty would not vote for a finding of guilty knowing that a guilty verdict would result in the imposition of the death penalty.

The State contends that, based upon Witherspoon supra, it may challenge for cause those jurors who are opposed to the imposition of the death penalty under any circumstances and who also would not find the defendant guilty under any circumstances. Because a juror's attitude towards the death penalty may be the basis for sustaining a challenge for cause, the State should be able to ask questions concerning that attitude, and such questioning does not violate the defendant's right to a fair trial.

II. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH THAT JOE HUNT'S DEATH WAS CAUSED BY POISON OR THAT THE AUTOPSY WAS PERFORMED ON THE BODY OF JOE HUNT.

The question of the sufficiency of the evidence to sustain the denial of the petitioner's motions for nonsuit is not a federal question and therefore the petition for writ of certiorari should be denied in accordance with this Court's Rule 19.

In addition to the above reason the State contends that petition should be denied because the petitioner's motions were properly denied at the trial. In ruling on such a motion in North Carolina the evidence introduced by the State is to be considered in the light most favorable to the State and the State is to receive the benefit of inferences drawn therefrom. State v Baxter, 285 N.C. 735, 208 S.E. 2d 696(1974); State v Price, 280 N.C. 154, 184 S.E. 2d 366(1971). The State introduced evidence that the deceased's death was caused by his consumption of arsenic. A medical expert called by the State testified that in his opinion the death was caused by arsenic poisoning. (Rp 47) The State also introduced testimony and photographs establishing that the autopsy was performed on the body of Joe Hunt (Rpp 25,26,38,39). Therefore the petitioner's claim that the State did not introduce such evidence is not correct and the petitioner's motions were correctly denied at the trial.

III. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONALITY OF THE RULE THAT FAILURE TO OBJECT TO CERTAIN EVIDENCE PRECLUDES AN APPELLATE REVIEW OF ITS ADMISSIBILITY, BECAUSE THAT ISSUE IS NOT A FEDERAL QUESTION OF SUBSTANCE, AND IN FACT THE SUPREME COURT OF NORTH CAROLINA DID REVIEW THE ADMISSIBILITY OF THE EVIDENCE.

The evidence under consideration in this issue was merely illustrative and corroborative of previous direct testimony. As stated in the opinion below, at page 413, failure to object to that type of evidence consitutes a waiver of any objection to its admissibility. The admission of the evidence under consideration did not adversely affect any substantial federal or state right of the petitioner. A rule precluding review of evidence not affecting the petitioner's rights does not raise a federal question of substance. The State contends that in the absence of an effect on the petitioner's Constitutional rights the decision not to object should be considered a trial tactic and an appellate court may properly decide not to review the admissibility of such evidence. Whether or not to object to such testimony is recognized as a trial tactic in our adversary system of justice. The Supreme Court of North Carolina has stated in State v Blackwell, 276 N.C. 714, at page 720,

> "Both this Court and the United States Supreme Court recognize that under our system of jurisprudence the trial of criminal cases is adversary in nature. To hold that an accused, represented by counsel, may choose one theory of trial and, upon an adverse verdict, call upon the appellate court to grant relief on the ground that the presiding judge should have intervened and guided his defense to another theory, would destroy the adversary system of trial and further tilt the scales of justice in favor of the criminal by prolonging ad infinitum the pronouncement of judgment in criminal cases."

The State also contends that the evidence was properly admitted and further that the evidence would have been admitted even if there had been a timely objection to

its admission. Finally the State contends that the opinion below indicates that the Supreme Court of North Carolina, in recognition of the seriousness of the crime and the penalty, in fact did review the admissibility of the evidence and determined that such evidence was properly admitted. Although the North Carolina Supreme Court repeated the rule in regard to the waiver, it went on to state at page 413 "We find no merit in the defendant's assignment of error relating to the admission in evidence of the State's Exhibits 3 and 7 and the testimony relating thereto." Therefore the petitioner was in no way prejudiced by the lack of objection.

CONCLUSION

The petition does not set out a special or important reason for granting a writ of certiorari, nor does it establish that the decision of the North Carolina Supreme Court involved a federal question of substance which had not previously been decided or that the decision was not in accordance with prior decisions of this Court. The State contends that the petitioner has not alleged or established any of the reasons for allowance of the writ as required by subsection 1.(h) of Rule 23 of this Court and that therefore the petition should be denied in accordance with section 4 of Rule 23 of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA on petitioner by depositing the same in the United States Mail to:

HENRY T. DRAKE
129 North Greene Street
Wadesboro, North Carolina 28170

ATTORNEY FOR PETITIONER

This the 2nd day of July, 1976.

Charles J. Murray
Assistant Attorney General